Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. **79-113**

BENJAMIN RAMOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered April 17, 1979.

CITATIONS TO OPINIONS BELOW

The Panel of the United States Court of Appeals for the Second Circuit which heard the appeal announced an oral opinion from the Bench at the

conclusion of the argument. That opinion, which will not be reported, is Appendix A hereto. There is no district court opinion on the Fifth Amendment issue. The only district court opinion (not reported) is Appendix B on the similar act.

JURISDICTION

The Court of Appeals judgment was entered April 17, 1979. Jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The petition presents two questions:

1. What should be the standard to determine whether a prosecutor's comment on defendant's exercise of the self incrimination privilege, not expressed but by inference, violates defendant's Fifth Amendment right not to take the stand?

2. What should be the standard to govern admission of similar crimes evidence under F.R.Evid. 404(b)?

PROVISIONS INVOLVED

The question presented involves so much of the Fifth Amendment to the United States Constitution as provides:

> ". . . nor shall [any person] be compelled in any criminal case to be a witness against himself."

as well as Rule 404(b):

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ..."

STATEMENT

The Government indicted and then convicted petitioner Benjamin Ramos for conspiring to and distributing cocaine, carrying a gun during the commission of that drug offense, and assaulting a federal officer, to wit, a drug enforcement administration agent, in the performance of the latter's official duties. The Government's proof was that of a professional informant, Eduardo Demarzo, and Jaime Fortesa, a DEA agent posing as a narcotics dealer, who obtained an offer of cocaine at $49,000 per kilo from one Manuel De Santiago. Further negotiations ensured in which Ramos was introduced to

Demarzo and Fortesa as DeSantiago's partner and then, according to Fortesa, a meeting was set up with DeSantiago on September 19, 1978 for the purchase of one kilo for $49,000 in DeSantiago's 94th Street Manhattan apartment.

On that date Fortesa met DeSantiago, was taken by him to the apartment, and was shown by him the cocaine and a scale. Fortesa then arrested him. Ramos then knocked on the door, Fortesa told him that he also was under arrest, shots were exchanged, and eventually agents arrested Ramos coming from a building next door with no gun and none found in the surrounding area.

DeSantiago pleaded guilty to cocaine offenses and the Government tried Ramos alone, presenting to the jury as its direct case basically the facts outlined above. Ramos' defense, based largely on DeSantiago's testimony in his behalf, was that the arrangements with Fortesa were DeSantiago's alone, that various telephone conversations he had with

Fortesa (taped by the Government), related to Fortesa's interest in merchandise from Ramos' clothing store rather than, as the Government contended, cocaine and that his appearance at the apartment on September 19, 1978 was for purposes of picking up DeSantiago for a social engagement. Ramos did not testify.

In rebuttal to DeSantiago's testimony on Ramos' behalf, the Government was permitted to introduce evidence that in 1971 Ramos had been charged with and pleaded guilty to involvement in heroin distribution. On summation furthermore the trial assistant made much of the fact that DeSantiago had testified on Ramos' behalf, comparing that testimony to the Government's insistence that Ramos had as well hid behind DeSantiago during the cocaine transaction in these words:

> "And he says that these agents have no concern for the truth, no concern for the truth. And he puts Mr. DeSantiago on the witness stand, ladies and gentlemen. Mr. DeSantiago's

testimony wasn't even consistent with what he told the Judge under oath a week before, and Mr. Kaplan puts that man on the stand, and he says, 'The agents have no concern for the truth.'

"Why is Tito always the guy doing all the talking? Isn't he the big guy? Is it Benny? Well, I submit to you, ladies and gentlemen, it's not the big guy that gets out in front.

"It's up to you to decide, but does it made sense if the big guy gets out there and exposes himself? There must have been somebody else even bigger than Benny in this deal, but nobody knows who, nobody knows where, because the guy that is even bigger or whoever it is who is even bigger keeps even farther removed from the scene."

The jury convicted Ramos of the crimes we mentioned earlier. The United States District Court for the Southern District of New York (Cannella, J.) sentenced Ramos to fifteen years imprisonment and a committed fine of $50,000, concurrently, on both the conspiracy and distribution counts, a concurrent ten year sentence on the assault count, and a consecutive five year sentence on an aggregated weapon count, for a twenty year term in all. Ramos appealed to

the Second Circuit, raising both the similar act issue and the prosecutor's comment. These and other claims were rejected by the Court of Appeals in its oral opinion and judgment.

REASONS FOR GRANTING THE WRIT

The two questions involved in this case are important to the administration of justice, in the first involve a conflict of the circuits, and should be decided by this Court.

With respect to the similar act question, we note the extreme diversity depending on the circuit involved. The Fifth Circuit requires clear and convincing proof for similar act admissibility. United States v. Rice, 550 F.2d 1364 (5th Cir. 1977); United States v. Myers, 550 F.2d 1036 (5th Cir. 1977). So does the Seventh. United States v. Feinberg, 535 F.2d 1004 (7th Cir. 1976); United States v. Ostrowsky, 501 F.2d 318 (7th Cir. 1974). Likewise the Eighth, United States v. Davis, 551 F.2d 233 (8th Cir. 1977), and the District of Columbia Circuit. Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964).

In the Second Circuit there are now some restrictions, but exactly what are hard to tell. Compare, United States v. Braunig, 553 F.2d 777 (2d Cir. 1977) with United States v. Benedetto, 571 F.2d 1246 (2d Cir. 1978); United States v. Gubelman, 571 F.2d 1252 (2d Cir. 1978); United States v. O'Connor, 580 F.2d 28 (2d Cir. 1978); United States v. Williams, 577 F. 2d 188 (2d Cir. 1978) and United States v. Manafzadeh, 2d Cir. Jan. 23, 1979.

The similar act question should be settled once and for all by this Court and this is an appropriate case to do it.

With respect to the Fifth Amendment point, the rule in the Second Circuit at least is that comments by a prosecutor concerning a failure to testify can serve for reversal if the jury would "naturally and necessarily interpret them as a comment on such failure" United States v. Bubar, 567 F.2d 192 (2d Cir. 1977). See also Malloy v. Hogan, 378 U.S. 1 (1964) and Griffin v. California, 380 U.S. 609 (1965). The Circuit court

here refused to construe the prosecutor's remarks as an improper comment on petitioner's exercise of the Fifth Amendment privilege because of the restriction of the "naturally and necessarily interpret" rule. We submit on the other hand that the prosecutor's comments were plainly an invitation to the jury to find that Ramos was indeed involved in the cocaine transaction, as the Government claimed, hiding behind DeSantiago because Ramos, as the Government claimed also, hid behind DeSantiago at the trial through his failure to testify. We submit that the comments came within Malloy v. Hogan, supra, and Griffin v. California, supra, that this Court should examine the rule which permitted the Government to avoid that result, and that upon such re-examination should reverse the conviction.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee :

v. : Docket No. 79-1031

BENJAMIN RAMOS, a/k/a Benny, :
MANUEL ENRIQUE DeSANTIAGO, :
MIGUEL VALDEZ, :

Defendants :

BENJAMIN RAMOS, :

Defendant-Appellant. :

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Before:

HON: IRVING R. KAUFMAN, Chief Judge,
J. JOSEPH SMITH, Circuit Judge, and
LLOYD F. MacMAHON*, District Judge.

New York,

STATEMENT MADE BY THE COURT AT DISPOSITION OF APPEAL IN OPEN COURT.

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*HONORABLE LLOYD F. MacMAHON, United States District Judge, Southern District of New York, sitting by designation.

APPENDIX A

JUDGE KAUFMAN:

Gentlemen - We don't have much difficulty with this case. We will affirm.

In August 1978, D.A. Agent Forteza, posing as a narcotics buyer, was introduced to Ramos by Tito, Ramos' partner. Ramos agreed to sell 3 kilos of cocaine to Forteza. Negotiations followed and Ramos instructed the agent to call him, and to refer to the drugs as "shirts". There ensued a series of recorded phone conversations between them in which they discussed delivery of the "shirts". Finally, on September 19th, Forteza and Tito met at an apartment, where Tito was arrested when he produced a kilo of cocaine. Ramos soon arrived, and knocked on the door, but when Forteza told him he was under arrest, Ramos fired two shots at him and fled. Ramos, who did not testify, presented witnesses and argued to the effect that he was in the clothing business, and really was selling shirts to Forteza. Ramos contends that it was error to permit the government to introduce into evidence his previous narcotics conviction. The government, however, clearly established that this evidence was highly relevant to appellant's intent since Ramos asserted throughout the trial that he was selling clothing and not narcotics to Agent Forteza.

Moreover, Judge Cannella carefully limited the scope of the evidence submitted, allowed the government to introduce it only after the defense had rested, and clearly instructed the jury on its proper use. I cite you to United States v. Williams, decided in 1979; United States v. Danzy, opinion by Judge Oakes, a panel on which I sat in 1979. As for the prosecutor's alleged comment on Ramos' failure to testify, our reading of the rebuttal summation makes it clear that the government was referring to appellant's silence during the negotiations between Forteza and Tito, and not to the trial. No juror could, as the defendant seems to indicate, naturally and necessarily construe the statement to be a comment on Ramos' having failed to take the stand. Ramos also raises the matter of the charge to the jury on the New York Gun Statute. Failure to object to the charge is hardly surprising, for the defense never contended that Ramos was traveling uninterruptedly through New York state with his gun in a

sealed container, and since there was no factual predicate for instructing the jury on the exception clause of the statute, no error was committed.

We will comment only briefly on appellant's attack on the sentence imposed. Judge Cannella read the sentence report, as well as letters submitted on behalf of Ramos, and he also heard from counsel. There is no basis for the allegation that sentence was mechanically imposed. Given the gravity of the crimes of which he was convicted, and for which he could have received, I believe, 80 years, we see no basis for disturbing the sentence on grounds of severity. As to the other points raised by counsel, we see no merit. We will affirm. Thank you.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. Trial Transcript pp. 714-15

BENJAMIN RAMOS

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THE COURT:

". . . the application by the government to introduce evidence of the defendant Ramos' previous narcotic conviction on cross examination of the defendant DeSantiago and if the government so desires in rebuttal is granted.

"Contrary to the testimony of the two prosecution witnesses, DeSantiago, a co-defendant, called as a defense witness, has testified that Ramos did not participate in conversations concerning narcotics on any occasion. Specifically, DeSantiago has testified that Ramos did not talk about narcotics with Fortesa and Eduardo in the Chinese restaurant and that Fortesa was asking Ramos to get "shirts" for him.

"Until this time the court has not permitted the government witnesses to testify that Ramos told them in the Chinese restaurant that he had to be very careful because he had a prior narcotics conviction, but in view of DeSantiago's testimony and the inference that may be drawn from the cross examination of certain government witnesses, the court will now allow the government to do three things: first, to cross examine DeSantiago about the alleged statement. Two, to introduce testimony in rebuttal concerning the alleged statement, and three, to introduce the judgment of conviction, if they so desire."